



jurisdiction.⁹⁹ In order to discourage avoidance of this tax by purchase from an out-of-state source, such a system should also include a tax on the in-state use of all personal property, with a deduction allowed to the extent that the property has already been taxed under the gross receipts provision or under a sales levy in the state of origin of the goods.¹⁰⁰ States have not readily resorted to this system because of administrative difficulties inherent in a determination of a fair apportionment in each case, but have generally preferred levies on retail sales of personalty.¹⁰¹ Judicial adherence to old commerce concepts has insulated the interstate merchant from application of this type of statute, and has resulted in depletion of state revenues and harassment of local merchants. The Supreme Court's most recent decisions in this field seem to have created a method whereby interstate transactions that have hitherto escaped retail sales taxation entirely may be reached by one of the interested states. The newly articulated double taxation test, with the aid of the due process limitation upon extraterritorial taxation, may in the future be invoked to breathe life into Justice Holmes' mandate that "interstate commerce must pay its way."

UNFAIR COMPETITION AND EXCLUSIVE BROADCASTS OF SPORTING EVENTS

A LEGAL system developed to meet the needs of less complex eras must often prove inadequate to cope with the problems incident to the immense potentialities of modern technology. When such issues arise, the judiciary is faced with the choice of stretching old maxims beyond all recognition, or of adopting a more flexible instrument, based on a sound grasp of the problems of policy involved. Such a choice has been precipitated by the mushroom growth of radio. The practicability of broadcasting news events while they are still in progress has been largely responsible for the present unparalleled public interest in outdoor sporting events. The willingness of commercial sponsors to pay well for the exclusive right to capitalize on this interest has made the preservation of sole control of broadcasts from athletic parks and stadia a matter of extreme importance to their owners. To protect this valuable commercial interest old theories of property, trespass, and nuisance are wholly inadequate. An equitable solution can be attained by the courts only through an extension of the flexible doctrine of unfair competition.

The growth of the law of unfair competition represents a struggle to attain a mean between the conflicting doctrines of monopoly and laissez-

99. See note 12, *supra*.

100. See, *e.g.*, Wash. Laws 1935, c. 180, § 32(c).

101. See, *e.g.*, CALIF. GEN. LAWS (Deering, 1937) Act 8493.

faire.¹ In the early period of revitalized trading which followed the Industrial Revolution, the reaction from monopoly was so violent that outright malice was virtually the only available ground for equitable restraint of competitive practices.² The law of trade-marks at length imposed a partial limitation on trade piracy.³ This limitation was later broadened to include any attempt, by copying the label, appearance, or name of commercial goods, to pass off a rival's product as one's own, and so get the benefit of his established reputation and good will.⁴ This was an important advance, but the courts at first threatened to thwart further progress by unduly restricting relief to cases containing the elements both of public deception and of direct financial damage.⁵ Such a rule placed too great an emphasis on the factual probability of immediate loss of sales. It refused to recognize an injury unless the stolen trade-name was applied to goods of the same sort, sold in the same region, and to the same class of customer as the complainant's.⁶ Realizing that realms of possible expansion are sharply curtailed if competitors are free to use the trade name in all but the already occupied sphere of activity, courts gradually reduced preemption of this sort by forbidding merchants to apply the established trade names of others to similar, or related goods.⁷

1. See Haines, *Efforts to Define Unfair Competition* (1919) 29 YALE L. J. 1; Jones, *Historical Development of the Law of Business Competition* (1926) 35 YALE L. J. 905, (1927) 36 YALE L. J. 42, 207, 351.

2. *Mogul Steamship Co., Ltd. v. McGregor, Gow & Co.*, 23 Q. B. D. 598 (1889). Malice is still always a ground for unfair competition relief. *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373 (1911) (malicious wrong to induce breach of contract); *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946 (1909) (establishing barber shop for the purpose of injuring rival enjoined). See Haines, *supra* note 1, at 6.

3. As late as 1742 English courts of equity refused to enjoin infringement of trade-marks. *Blanchard v. Hill*, 2 Atk. 484 (Ch. 1742). In 1838, however, an injunction was granted even in the absence of proof of fraudulent intent. *Millington v. Fox*, 3 Myl. & C. 338 (Ch. 1838).

4. See *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 412 (1916); Glenn, *Preemption in Connection with Unfair Trade* (1919) 19 COL. L. REV. 29; Rogers, *Unfair Competition* (1919) 17 MICH. L. REV. 490; Comment (1913) 26 HARV. L. REV. 442.

5. *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281 (C. C. A. 6th, 1900); *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F. (2d) 603 (C. C. A. 2d, 1925); McLaughlin, *Legal Control of Competitive Methods* (1936) 21 IOWA L. REV. 274.

6. *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403 (1916) (plaintiff and defendant in different geographical territories); *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 Fed. 510 (C. C. A. 7th, 1912) (different non-competing products so no deprivation of sales); *Charles Broadway Rouss, Inc. v. Winchester Co.*, 300 Fed. 706 (C. C. A. 2d, 1924) (defendant sold complained of product to a limited clientele of specialized interests so held no harmful competition); *Borthwick v. The Evening Post*, 37 Ch. D. 449 (1888) (morning paper held not damaged by use of its name on evening paper). See Oates, *Relief in Equity Against Unfair Trade Practices of Non-Competitors* (1931) 25 ILL. L. REV. 643; Comment (1913) 26 HARV. L. REV. 442.

7. *Peninsular Chemical Co. v. Levinson*, 247 Fed. 658 (C. C. A. 6th, 1917) (cigar manufacturer enjoined from using name of drug store on product not yet handled, on the ground of preemption before actual use); *Aunt Jemima Mills Co. v. Rigney & Co.*, 247 Fed. 407 (C. C. A. 2d, 1917) (manufacturers of syrup enjoined from using name of

The more liberal cases abandon the pretext of the "related goods" doctrine and extend protection quite apart from threatened competition or even fraud;⁸ for the value of a trade-name lies in its exclusive connotation of a particular line of goods. The decreasing emphasis on immediate competition was paralleled by a gradual relaxation of the rigid requirement of deception. Under the "related goods" doctrine, for example, there need be neither fraudulent intent nor public deception.⁹ All that is required is an actual misrepresentation the natural result of which is to deceive the consumer. As the doctrine was more liberally applied to increasingly dissimilar goods, the likelihood of deception grew progressively smaller; and under the most advanced cases, which protect a name for the sole purpose of preventing a loss of its exclusive quality, deception may be absent altogether.¹⁰ This minimization of the importance of deception is not confined to trade-name cases. Under the liberal view, as is illustrated by the famous case of *International News Service v. Associated Press*,¹¹ the essence of the wrong of unfair competition is frequently not misrepresentation but misappropriation.¹² Deception is but a means of gaining the wrongful end, and an element of the broader damage, though often it is an important element in a particular case.¹³

Because fraud is in many cases an invalid explanation of the granting of equitable relief on the ground of unfair competition,¹⁴ some judges, searching for a more comprehensive criterion by which to limit the new extensions

flour manufacturer). See Glenn, *Preemption in Connection with Unfair Trade* (1919) 19 COL. L. REV. 29.

8. *Churchill Downs Distilling Co. v. Churchill Downs, Inc.*, 262 Ky. 567, 90 S. W. (2d) 1041 (1936), (1937) 25 Ky. L. J. 280.

9. The earlier cases required actual fraudulent intent. *Coats v. Merrick Thread Co.*, 149 U. S. 562 (1893); *Lawrence v. Tennessee Co.*, 138 U. S. 537 (1891) (general requirement of deceitful representation or perfidious dealing). More recently, even where passing off is required, a plausible misrepresentation likely to mislead the consumer has been ruled sufficient. *McLean v. Fleming*, 96 U. S. 245 (1877); *Coca Cola Co. v. Koke Co. of America*, 254 U. S. 143 (1920); (1931) 7 VA. L. REV. 481.

10. See note 8, *supra*.

11. *International News Service v. Associated Press*, 248 U. S. 215 (1918) (International News enjoined from copying news from the bulletin boards and early editions of the Associated Press subscribers).

12. *Id.* at 242.

13. See Comment (1933) 46 HARV. L. REV. 1171, 1173. Some jurists think fraudulent means the very basis of the doctrine. See *International News Service v. Associated Press*, 248 U. S. 215, 248 (1918) (Justice Brandeis dissenting). Deception is perhaps of particular value in cases where, because of the availability of copyright or patent, or the expiration of the statutory period, courts are especially hesitant in granting protection. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169 (1896) (name protected, after expiration of statutory period, from deception).

14. It cannot, of course, explain the granting of relief in cases where no deceit was present. Conversely, the presence of fraud usually results in no relief in cases involving business schemes. *Bristol v. Equitable Life Assurance Soc.*, 132 N. Y. 264, 30 N. E. 506 (1892) (new system for soliciting insurance); *Haskins v. Ryan*, 71 N. J. Eq. 575, 64 Atl. 436 (1906) (plan for co-ordinating white lead industries).

of the doctrine, have settled upon the term "unfairness."¹⁵ But on the whole, courts preferring language with a greater appearance of substantive meaning have taken as their guide the traditional concept that equity protects property rights only.¹⁶ Hoary rules devised to protect material possessions have been extended in order to safeguard less tangible interests today regarded as valuable. Letters, lectures, pictures, plays, trade secrets, news, business systems and business reputations have been clothed in the protective mantle of "property."¹⁷ That equity should grant this protection is eminently just and necessary. To pilfer a man's painfully developed good will is as surely theft as to steal his car or his dog, and involves a far greater loss of personal and economic values. But the use, in this connection, of the term property, so vague and many sided, so redolent of old common law rights unrelated to present day trade relational interests,¹⁸ is perhaps unfortunate. The inherent judicial tendency to attempt the solution of all new problems by the use of traditional phraseology¹⁹ may be justified in terms of metaphysical legal logic; but, in actual practice, it leads to considerable confusion of issues.²⁰

Furthermore, property, in this new sense, is a dangerously broad concept; it tends to become virtually a synonym for value.²¹ And to protect something merely because it is valuable is to indulge in a meaningless circularity of reasoning. Property in this sense follows, and does not lead the law.²² That a trade-mark is valuable is the result, not the cause of its support by the courts. Financial loss and destructive competition are not in themselves grounds for relief;²³ they are, indeed, to some extent necessary incidents to

15. See *Steff v. Bing*, 215 Fed. 204, 206 (S. D. N. Y. 1914) ("Unfair competition consists in selling goods by means which shock judicial sensibilities"); *NIMS, UNFAIR COMPETITION AND TRADE MARKS* (3d ed. 1929) § 9-a (basis of the doctrine is the accepted community standard of fair play).

16. *Gee v. Pritchard*, 2 Swans. 402 (Ch., 1818). For list of cases discussing property right as basis for equitable jurisdiction see Note (1921) 14 A. L. R. 295.

17. *E.g.*, *Caird v. Sime*, 12 App. Cas. 326 (1887) (lectures); *Reed v. Carter*, 268 Ky. 1, 103 S. W. (2d) 663 (1937).

18. Green, *The Right of Privacy* (1932) 27 ILL. L. REV. 237, 238 ("property" should be confined to tangible things, not applied to relational interests, however valuable).

19. See note 16, *supra*.

20. See Comment (1919) 19 COL. L. REV. 233, 238 (the "chameleon test of property" leads in unfair competition cases to "harrowing and metaphysical questions").

21. See *Associated Press v. International News Service*, 245 Fed. 244, 248 (C. C. A. 2d, 1917) ("property" covers all exchangeable values); *NOYES, INSTITUTION OF PROPERTY* (1936) 346 (standard of exchangeable value).

22. See *International News Service v. Associated Press*, 248 U. S. 215, 246 (1918) (Holmes' separate opinion states that property is the creation of the law, and does not arise from exchangeable value); *Victoria Park Racing Co., Ltd. v. Taylor*, 37 N. S. W. 322, 342 (1936) ("*sic utere tuo*" mere "benevolent yearning" unless altered to conclude so as not "to infringe upon another's right"); Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809, 815.

23. See *National Exhibition Co. v. Teleflash*, 24 F. Supp. 483, 489 (S. D. N. Y. 1936) (damage without violation of a right creates no cause of action); *Keeble v. Hick-*

the free struggle which our system recognizes as productive of progress. It is, therefore, vital that the courts pierce this veil of legal phrases, and give careful consideration to the underlying questions of policy which are the ultimate bases²⁴ of decisions in unfair competition cases. It is only when these questions have been resolved in favor of the erection of an equitable right to protection that this right can accurately be termed property.

A determination of the advisability of protecting intangible trade values involves a resolution of conflicting public policies. While a grant of exclusive enjoyment benefits the entrepreneur, it may also burden the public with the creation of a monopoly. Though the concepts of a profit system of economy dictate encouragement of initiative by protection of its fruits, still it must be remembered that the current availability of new ideas is an important stimulus to progress. Consequently it is generally held on grounds of public policy that business schemes, mere ideas not yet reduced to practice, are not subject to protection. The possessor is left to safeguard himself as best he can by secrecy or specific contract,²⁵ and in certain situations even fraud is no ground of relief.²⁶ It would seem that if the obvious difficulties of proof of ownership could be overcome,²⁷ public interest might be forwarded by protecting the propounder of new and useful ideas at least from preemption by all types of fraud.²⁸

Where the courts do admit the existence of a right to exclusive enjoyment, there remains the question of the scope of that right. Courts must determine the boundaries that fix the point at which private property is merged in the

eringill, 11 East. 574, 576 (K. B. 1809) (decreasing profits of an established occupation not in itself an actionable injury); Paton, *Broadcasting and Privacy* (1938) 16 CAN. B. REV. 425, 436 (financial loss alone insufficient for relief).

24. See *International News Service v. Associated Press*, 248 U. S. 215, 246, 248 (1918).

25. See *Bristol v. Equitable Life Assurance Society*, 132 N. Y. 264, 267, 30 N. E. 506, 507 (1892). Contract is apparently the only successful theory of recovery in this class of case. *Liggett & Myers Tobacco Co. v. Meyer*, 101 Ind. App. 420, 194 N. E. 206 (1935) (recovery of the reasonable value of an advertising scheme suggested by plaintiff, on theory of acceptance of plaintiff's offer); (1935) 44 YALE L. J. 1269. Of course, the suggested scheme must even under this theory be novel enough to be of value to the recipient. *Id.* at 1271.

26. *Haskins v. Ryan*, 71 N. J. Eq. 575, 64 Atl. 436 (1906) (plan for co-ordination of the lead industry); *Bristol v. Equitable Life Assurance Society*, 132 N. Y. 264, 30 N. E. 506 (1892) (new system of soliciting insurance).

27. See (1935) 44 YALE L. J. 1269, 1270, 1272.

28. The denial of protection probably stems from common law conservatism which hesitates to recognize property in unsupported intangibles. See *Millar v. Taylor*, 4 Burr. 2303, 2361 (K. B. 1769). Similarly ideas in copyrighted works may be freely used [*Baker v. Selden*, 101 U. S. 99 (1879) (novel system of bookkeeping)], but only if the taker employ an individual treatment, not merely colorable variations [*Nutt v. National Institute, Inc., For the Improvement of Memory*, 31 F. (2d) 236 (C. C. A. 2d, 1929)]. But protection from deceptive means is afforded at common law when an idea has enough tangible support to be rated a trade secret. See note 30, *infra*. The ephemeral nature of the line between ideas and trade secrets is illustrated by *Montegut v. Hickson, Inc.*, 178 App. Div. 94, 164 N. Y. Supp. 858 (1st Dep't 1917).

public domain. These boundaries vary in each case and class of cases according to the balance between the closeness of association of the right with its possessor, and its general utility to the public. Some property, if available to competitors, would be valuable *per se*, a useful tool in its own right. This type of intangible possession consists more of content, of idea or fact, than of form, and so is at once more widely useful, and less closely associated with its owner. A trade secret²⁹ is a possession of this type. Because of its widespread potential value, its use by another is permitted if its discovery resulted from independent investigation and analysis; but because of its association, through the outlay of thought and money, with its owner, it is protected from use following discovery by fraudulent means.³⁰ Some intangible property, on the other hand, is of value not because of any possibility of functional use in a rival's business, but purely by virtue of those attributes which serve to associate it with its owner. Thus a trade mark, symbolic of trade good will, gains its value from secondary associations with a certain business. To copy it serves no end except to profit by the actual fruits of a competitor's efforts, and such theft is therefore enjoined regardless of the means employed.³¹ The value of literary property also lies in its originality of form, of personal expression, and such property, unlike a trade secret, is protected from discovery and use by another.³² Its exclusive possession is lost only by abandonment by the owner through publication, which is considered a dedication to the public.³³ Under the usual statement that intent is the criterion of abandonment, the owner himself may determine the extent of dedication. Publication for certain purposes, or to a certain class of people only, does not result in the loss of exclusive possession for other purposes, or against other classes.³⁴

29. A trade secret has been defined as "an idea, known only to a few, which is reduced to practice in such manner that it is, or can very readily be made, a source of profit in a trade or business." See Comment (1928) 42 HARV. L. REV. 254, n. 1.

30. See *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373, 402 (1911); *Tabor v. Hoffman*, 118 N. Y. 30, 36, 23 N. E. 12, 13 (1889). The same doctrine is supported by the "ticker" cases, which hold that others may collect the specific information plaintiffs are seeking to protect, but may not by unfair means pilfer the already collected facts. See *Board of Trade v. Christie Grain and Stock Co.*, 198 U. S. 236, 250 (1905); *F. W. Dodge Co. v. Construction Information Co.*, 183 Mass. 62, 64, 66 N. E. 204, 205 (1903); *Kiernan v. Manhattan Quotation Telegraph Co.*, 50 How. Pr. 194, 196 (N. Y. 1876).

31. See *Hueblein v. Adams*, 125 Fed. 782, 785 (C. C. Mass. 1903); *cf. Marvel Co. v. Pearl*, 133 Fed. 160, 162 (C. C. A. 2d, 1904) (copying non-functional parts of machinery); *Lectro-Shave Corp. v. General Shaver Corp.*, 19 F. Supp. 843, 844 (D. Conn. 1937).

32. An author has an exclusive right to his creation until he voluntarily parts with it. See *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 299 (1907); *Palmer v. DeWitt*, 47 N. Y. 532, 536 (1872).

33. After voluntary abandonment through publication, copyright replaces all common law rights, and if the author has failed to take out copyright, he loses all rights. See *Tompkins v. Halleck*, 133 Mass. 32, 36 (1882).

34. This is the doctrine of limited, as against general publication. It depends on the imposing of restrictions, express or implied, on the extent of use granted to the public.

The court in the *News* case,³⁵ noted above as the keystone of the liberal unfair competition doctrine, faced a delicate problem in the application of these rules to news items. News cannot be classified either as a trade secret, where content is paramount, or as literary property, the value of which lies in form. It consists not in facts, for these are open to anyone who can find them, but in their painstaking collection and correlation; not in literary expression, but in a prompt straightforward publication of events of current interest.³⁶ As a result, the protection afforded by copyright to published literary works is legally unavailable;³⁷ and the principle forbidding fraudulent discovery of trade secrets is inapplicable to a situation in which secrecy is an impossibility.³⁸ Yet protection is demanded not only by the equities of the situation, but also by public need.³⁹ Without such protection it is quite possible that large news gathering organizations would be virtually forced to dissolve, depriving the public of a valuable service.⁴⁰

The court solved the problem by an extension of the doctrine of limited publication.⁴¹ Since, in news reports, the competitor is appropriating not tools to be utilized in his own efforts, but the very source of profit, the finished product of a whole business enterprise, absolute protection is appropriate unless exclusive possession has been abandoned by dedication.⁴² In terms of intent, publication in early editions is a release of all rights as against an ordinary use by the general public, but abandons none of the privilege of exclusive use of the news as material for commercial profit. In that sense it is still property for so long as it retains commercial value. Since in the case of news that period is not a long one,⁴³ the rule of the *News* case

See *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 299 (1907); *Aronson v. Baker*, 43 N. J. Eq. 365, 369, 12 Atl. 177, 180 (Ch. 1887); *Waring v. W. D. A. S. Broadcasting Station, Inc.*, 327 Pa. 433, 443, 194 Atl. 631, 636 (1937); cf. *McDermott Commission Co. v. Board of Trade*, 146 Fed. 961, 964 (C. C. A. 8th, 1906). But see *Jewelers' Mercantile Agency, Ltd. v. Jewelers' Weekly Publishing Co.*, 155 N. Y. 241, 248, 49 N. E. 872, 874 (1898); *Larrowe-Loisette v. O'Loughlin*, 88 Fed. 896, 898 (C. C. S. D. N. Y. 1898).

35. *International News Service v. Associated Press*, 248 U. S. 215 (1918).

36. Thayer, *Legal Rights for News* (1938) 24 A. B. A. J. 17.

37. See *International News Service v. Associated Press*, 248 U. S. 215, 234 (1918); *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 298 (C. C. A. 7th, 1902); NIMS, UNFAIR COMPETITION AND TRADE MARKS (3d ed. 1929) 739.

38. See *Associated Press v. International News Service*, 245 Fed. 244, 250 (C. C. A. 2d, 1917); Comment (1930) 14 MINN. L. REV. 537, 543.

39. See *International News Service v. Associated Press*, 248 U. S. 215, 240 (1918).

40. See *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 296 (C. C. A. 7th, 1902).

41. See note 34, *supra*.

42. See *International News Service v. Associated Press*, 248 U. S. 215, 236, 240 (1918); *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 299 (C. C. A. 7th, 1902); *Fonotipia, Ltd. v. Bradley*, 171 Fed. 951, 960 (C. C. E. D. N. Y., 1909).

43. See *Board of Trade v. Christie Grain and Stock Co.*, 198 U. S. 236, 251 (1905) ("A priority of a few minutes probably is enough"); *International News Service v. Associated Press*, 248 U. S. 215, 245 (1918) (for so long as the news has commercial

achieves a nice balance of equities. It grants a brief commercial monopoly, which encourages the useful enterprise of news collection, without depriving the public of reasonably rapid access to news. Minimizing the importance of the elements of fraudulent or deceptive means of misappropriation, the court rested its decision squarely on the true bases of the doctrine of unfair competition. The old requirement that the appropriated property be used in direct competition with its offended creator was reasserted;⁴⁴ but, perhaps, only because the central theory of the case was that as to all non-competitors the very nature of the business required abandonment of all rights.

There has been a tendency to limit the liberal rule of the *News* decision to cases directly involving news dissemination, and to reaffirm the former criterion of deception in other situations. In the absence of the use of deceptive means of appropriation, protection has been denied dress designs.⁴⁵ The case which gave impetus to this trend⁴⁶ may have turned on the availability of patent protection,⁴⁷ or the lack of originality in the design, but, nevertheless, it seems to represent an unfortunate retrogression to a seemingly discarded dogma in these dress design cases.⁴⁸

The continued refusal of protection to advertising schemes,⁴⁹ on the other hand, is perfectly orthodox under existing law. Ideas are generally denied

value); *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 295 (C. C. A. 7th, 1902) (until sixty minutes after the items are printed).

44. See Oates, *supra* note 6, at 651.

45. *Cheney Bros. v. Doris Silk Corp.*, 35 F. (2d) 279 (C. C. A. 2d, 1929); *Monte-gut v. Hickson*, 178 App. Div. 94, 164 N. Y. Supp. 858 (1st Dep't 1917). The latter case ruled that dress designs could not be obtained by fraudulently posing as a customer. This ruling follows the well established rule for trade secrets, also followed in the "ticker cases." See note 30, *supra*. Cf. *Tabor v. Hoffman*, 118 N. Y. 30, 26 N. E. 12 (1889) (trade secret rule applied to mechanical patterns).

46. *Cheney Bros. v. Doris Silk Corp.*, 35 F. (2d) 279 (C. C. A. 2d, 1929). The protection which the courts refuse, the manufacturers themselves have attained by the formation of a guild of apparel manufacturers "to the end that the manufacturers of original styles could better protect the fruits of their labor." Registration of original designs was required, copying forbidden, and boycotting of non-cooperative retailers provided for. The court ruled the organization legal under the anti-trust laws, as it did not suppress competition or prejudice the public interest. *Filene's Sons Co. v. Fashion Originators' Guild of America*, 14 F. Supp. 353 (D. Mass. 1936), *aff'd*, 90 F. (2d) 556 (C. C. A. 1st, 1937).

47. See *Waring v. W. D. A. S. Broadcasting Station, Inc.*, 327 Pa. 433, 452, n. 12, 194 Atl. 631, 640 (1937). The availability of copyright or patent protection is one factor to be considered in determining the presumptive intent to abandon rights. See note 34, *supra*. But the mere fact that an article is proper for a patent does not prevent unfair competition protection. See *Peabody v. Norfolk*, 98 Mass. 452, 458 (1863).

48. Following the same reactionary rule, protection from copying of a new name for an old song was refused in *Gotham Music Service, Inc. v. Denton & Haslins Music Pub. Co., Inc.*, 259 N. Y. 86, 181 N. E. 57 (1932). The copying was clearly an appropriation of the fruits of another's labor under the rule in the *International News* case, and a strong dissent so argued.

49. *Affiliated Enterprises, Inc. v. Gruber*, 86 F. (2d) 958 (C. C. A. 1st, 1936) (attempted preservation of exclusive use of the "bank night" scheme); *Crump v. Lindsay*,

legal protection.⁵⁰ Where evidence of ownership is provided by the addition of the element of form through the reduction of an idea or creation to practice, the courts have followed the rule of the *News* case, forbidding the theft of the very source of a man's profit, even by the use of means unchallenged *per se*.⁵¹ Furthermore, a recent case, extending to performers the protection formerly accorded only to the authors of artistic creations, strongly reasserted this liberal principle, holding fraud irrelevant and public performance an abandonment only to non-competitors.⁵² Another case extended the application of the rule to a situation where no direct competition was involved.⁵³ It would appear, therefore, that while the *News* case did not have the immediate far-reaching effect that was confidently predicted,⁵⁴ neither has it been so narrowly restricted as was subsequently feared.⁵⁵

With regard to news dissemination, whether by newspaper or radio, the *News* case has been more uniformly followed.⁵⁶ One problem created by the decision, however, requires separate discussion. The court in the *News* case drew a sound distinction between the product of the labors of a news gathering agency—collected news; and the source of that product—facts. The former it protected from commercial rivals; the latter it left free to all. Just as the trade secret and ticker cases allow all competitors to learn the protected

130 Va. 144, 107 S. E. 679 (1921) (adoption of advertising pamphlet for use with respect to defendants' identical goods). In the latter case, which contained the element of reduction to practice through printing of the catalogue, it is perhaps unfortunate that the court refused to follow the rule of the *International News* case. The former case, however, involves the theft of an idea rather than a real "business system," and thus comes under the rules as to business schemes. See note 26, *supra*.

50. See page 292, *supra*.

51. *Meccano, Ltd. v. Wagner*, 234 Fed. 912 (S. D. Ohio 1916) (attempted competitive sale of copied additional parts to plaintiff's toy sets, at a lower price than that set by plaintiff); *Meyer v. Hurwitz*, 5 F. (2d) 370 (E. D. Pa. 1925), *appeal dismissed*, 10 F. (2d) 1019 (C. C. A. 3d, 1926) (sale of cards copied from plaintiffs' for distribution through plaintiffs' vending machines); *Prest-O-Lite Co. v. Davis*, 209 Fed. 917 (S. D. Ohio 1913) (buying empty tanks specially designed by plaintiff for use in sale of defendants' gas).

52. *Waring v. W. D. A. S. Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937) (enjoining the commercial broadcast of plaintiff's records, which were labeled "not licensed for Radio Broadcast").

53. *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 358 (D. Mass. 1934) (enjoining sale of a script prepared by Ed Wynn for broadcast, and commercial use of the name "Graham McNamee").

54. See NIMS, *UNFAIR COMPETITION AND TRADE MARKS* (3d ed. 1929) 779.

55. See Handler, *Unfair Competition* (1936) 21 IOWA L. REV. 175, 191; Comment (1930) 14 MINN. L. REV. 537, 544.

56. *Associated Press v. Sioux Falls Broadcast Ass'n* (D. S. D. 1933) unreported [for decision see Brief for Petitioners, p. 22, *Pittsburgh Athletic Co. v. K. Q. V. Broadcasting Co.*, 24 F. Supp. 490 (W. D. Pa. 1938)]; *Associated Press v. K. V. O. S., Inc.*, 80 F. (2d) 575 (C. C. A. 9th, 1935), *rev'd on jurisdictional grounds*, 299 U. S. 269 (1936) (preliminary injunction preventing radio stations from broadcasting news items of complainant for so long as such broadcasts would constitute harmful competition).

information by independent investigation,⁵⁷ so in news cases anyone may himself go to the source of information.⁵⁸ Naturally enough there were efforts following the *News* case to come within this exception to the rule of restriction. In one case, where exclusive broadcasting rights to a prize-fight had been granted one radio company, another made the claim that it intended to compete by getting tips from the ringside and corroborating them through its own observers outside the stadium.⁵⁹ The issue thus raised was not directly settled, for the court found that the scheme, on its facts, was impracticable without the use of supplementary information taken from the licensed broadcast.⁶⁰ Since the cases had established that broadcasting news is not a general publication,⁶¹ and that rival radio stations are competing for profit even in the absence of direct payment,⁶² the situation was held clearly analogous to that in the *News* case.⁶³

A recent case in a federal district court has raised the problem in more striking form.⁶⁴ The Pittsburgh Pirates sold exclusive broadcasting rights for their baseball games to a commercial sponsor, operating over N.B.C. A rival broadcasting station, an unsuccessful applicant for this privilege, proceeded to broadcast similar play by play accounts allegedly made up from the independent observations of its own observers stationed on land leased by it outside the ball park.⁶⁵ The licensed companies and the athletic club sued jointly to enjoin the practice. As in the prize-fight case,⁶⁶ evidence was presented to show that defendants could not carry on successful broadcasts without using prohibited methods of corroborating their observations.⁶⁷ They were accused of pilfering information from the licensed broadcasts; and of inducing breach of contract by purchasing reports from Western Union, which was licensed to disseminate news to subscribing newspapers only, and from spectators, whose tickets uniformly stipulated nondisclosure of news

57. See p. 293, *supra*.

58. See *International News Service v. Associated Press*, 248 U. S. 215, 243 (1918).

59. *Twentieth Century Sporting Club, Inc. v. Trans-Radio Press Service, Inc.*, 165 Misc. 71, 300 N. Y. Supp. 159 (Sup. Ct. 1937).

60. *Id.* at 74, 300 N. Y. Supp. at 162.

61. *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 358 (D. Mass. 1934); *Associated Press v. K. V. O. S., Inc.*, 80 F. (2d) 575 (C. C. A. 9th, 1935).

62. See *Waring v. W. D. A. S. Station, Inc.*, 327 Pa. 433, 455, 194 Atl. 631, 641 (1937); *cf. Herbert v. Shanley Co.*, 242 U. S. 591 (1917); *Associated Press v. K. V. O. S., Inc.*, 80 F. (2d) 575 (C. C. A. 9th, 1935).

63. See *Twentieth Century Sporting Club, Inc. v. Trans-Radio Press Service, Inc.*, 165 Misc. 71, 73, 300 N. Y. Supp. 159, 161 (Sup. Ct. 1937).

64. *Pittsburgh Athletic Club v. K. Q. V. Broadcasting Co.*, 24 F. Supp. 490 (W. D. Pa. 1938).

65. See *Pittsburgh Athletic Club v. K. Q. V. Broadcasting Co.*, 24 F. Supp. 490, 492 (W. D. Pa. 1938); Brief for Petitioners, p. 5, *ibid.*

66. *Twentieth Century Sporting Club, Inc. v. Trans-Radio Press Service, Inc.*, 165 Misc. 71, 300 N. Y. Supp. 159 (Sup. Ct. 1937).

67. Mimeographed Findings of Fact No. 30, *Pittsburgh Athletic Club v. K. Q. V. Broadcasting Co.*, 24 F. Supp. 490 (W. D. Pa. 1938).

of the game during its progress.⁶⁸ These alleged activities are prohibited both by judicial mandate⁶⁹ and by the Federal Communications Act of 1934.⁷⁰ Their infusion into the case may have had some weight in inducing the court to grant the injunction, which was phrased in broad terms to include all the alleged wrongs.⁷¹ But the decision was not placed solely on these narrow grounds.⁷² Relying on the *News* case, the court held that by its "creation of the game, its control of the park, and its restriction of the dissemination of news therefrom,"⁷³ the athletic club gained a property right in the news value of the contest. Consequently, the granting of exclusive broadcasting rights was a justified capitalization on the labor and money expended; and a theft of the product of that labor and expense amounted to unfair competition.

The injunction could have been based entirely on the recognized unfair practices alleged; and so based, it would have been completely orthodox.⁷⁴ But the broader ground employed by the court requires analysis. The decision is stated in general terms derived from the *News* case. Yet of the recent cases with similar facts, one directly held the *News* case inapplicable;⁷⁵ and the other, though relying on the *News* case and holding the granting of exclusive broadcasting rights legally justified, expressly left open the question of whether these rights would be protected from infringement by independent observation from outside the stadium.⁷⁶ The situation, moreover, is clearly distinguishable on its facts from that in the *News* case. There the injunction prevented theft of correlated news reports; but it was explicitly stated that to collect the news by independent investigation was perfectly justified.⁷⁷ It is the right to do this very thing that defendants claim to exercise in the instant case; and what plaintiffs seek to protect is, therefore, not really final news, but the news value of the event they have created. It has been held that the mere creation of an event of general interest does not give exclusive rights to the news value thereof unless the creator can control the sources of

68. See *Pittsburgh Athletic Club v. K. Q. V. Broadcasting Co.*, 24 F. Supp. 490, 492 (W. D. Pa. 1938).

69. See *Twentieth Century Sporting Club, Inc., v. Trans-Radio Press Service, Inc.*, 165 Misc. 71, 73, 300 N. Y. Supp. 159, 161 (Sup. Ct. 1937).

70. 48 STAT. 1091, 47 U. S. C. § 325a (1934).

71. Preliminary Injunctive Decree, *Pittsburgh Athletic Club v. K. Q. V. Broadcasting Co.*, 24 F. Supp. 490 (W. D. Pa. 1938).

72. The court assumes defendants' version of its means of obtaining the information. See *Pittsburgh Athletic Club v. K. Q. V. Broadcasting Co.*, 24 F. Supp. 490, 492 (W. D. Pa. 1938).

73. *Ibid.*

74. See notes 69, 70, *supra*.

75. *National Exhibition Co. v. Tele-Flash, Inc.*, 24 F. Supp. 488 (S. D. N. Y. 1936) (a hastily written, poorly reasoned decision, denying the presence of competition. In that case, moreover, the admission tickets were unrestricted).

76. See *Twentieth Century Sporting Club, Inc. v. Trans-Radio Press Service, Inc.*, 165 Misc. 71, 74, 300 N. Y. Supp. 159, 162 (Sup. Ct. 1937).

77. See *International News Service v. Associated Press*, 248 U. S. 215, 243 (1918).

that news.⁷⁸ Such control is present in the class of cases concerning private exhibitions. It is exercised by an express or implied stipulation of nondisclosure attached to the license to use the premises where the exhibition occurs.⁷⁹ It exists in the instant case with regard to all those actually attending the games,⁸⁰ but clearly has no direct application to defendants, who are not interfering at all with the physical premises. The only effect of the strict control exercised by the plaintiffs over the admission to its spectacles is to show a clear intent to confine dissemination of the news.

The case turns on the question of whether this intent, sufficient to gain legal sanction for exclusive rights within the park,⁸¹ should operate to extend the scope of such rights beyond the physical limits controlled by the athletic club, despite the unequivocal doctrine of the trade secret and *News* cases that facts fairly discovered by independent investigation are freely available to all.⁸² In short the question is whether the courts, though they sanction limited monopolies of the news value of exhibitions, must deny protection to the monopoly desired in the instant case because the means used to violate it were not deceptive.

It would seem that the answer lies in fusing with the doctrine of unfair competition the principles of the right of privacy. The right of privacy, long recognized as an attribute of property,⁸³ is now gaining recognition as a generic field of law.⁸⁴ The more common realm of personal privacy, the right to be let alone, finds its basis in the principle that the constitutional privilege of "life" impliedly means the privilege to enjoy life free of unwarranted publicity.⁸⁵ It is limited by the same tests of consensual abandonment

78. See *Sports and General Press Agency, Ltd. v. "Our Dogs" Publishing Co., Ltd.* [1916] 2 K. B. 880, 883 (taking of photographs from a point outside the dog show grounds); Comment (1919) 32 HARV. L. REV. 566, 567. The case, however, does not support any unlimited right to photograph from outside the grounds, and the pictures were actually taken within the grounds on an unrestricted ticket. See *Victoria Park Racing and Recreation Grounds Co., Ltd. v. Taylor*, 43 "The Argus" L. Rep. 597, 609 (High Ct. of Australia, 1937).

79. See *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 300 (1907); *International News Service v. Associated Press*, 248 U. S. 215, 255 (1918) (Brandeis, J., dissenting); *Tompkins v. Halleck*, 133 Mass. 32, 43 (1882); *Sports and General Press Agency, Ltd., v. "Our Dogs" Publishing Co., Ltd.* [1916] 2 K. B. 880, 883.

80. The ball club, which owned the premises, took all available steps to restrict dissemination of news therefrom. See *Pittsburgh Athletic Club v. K. Q. V. Broadcasting Co.*, 24 F. Supp. 490, 492 (W. D. Pa. 1938).

81. See *Twentieth Century Sporting Club, Inc. v. Trans-Radio Press Service, Inc.*, 165 Misc. 71, 73, 300 N. Y. Supp. 159, 161 (Sup. Ct. 1937). On the general effect of intent see note 34, *supra*.

82. See notes 30, 58, *supra*.

83. See *Gee v. Pritchard*, 2 Swans. 402, 424 (Ch. 1818); *Prince Albert v. Strange*, 2 De Gex & Sm. 652, 695 (Ch. 1849); Warren and Brandeis, *The Right to Privacy* (1890) 4 HARV. L. REV. 193, 205, 211.

84. See Comment (1938) 33 ILL. L. REV. 87, 95.

85. See *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 195, 50 S. E. 68, 69 (1905); *Munden v. Harris*, 153 Mo. App. 652, 659, 134 S. W. 1076, 1078 (1911);

and public interest analyzed above.⁸⁶ Thus a person cannot complain of publicity which he has himself instigated or authorized; and when a man becomes a public character, he loses his privacy right to the degree that he is a source of legitimate news interest.⁸⁷

Though the new right is regarded as dominantly a personal one,⁸⁸ there seems to be no reason why it should not be applied also, on parallel principles of undisturbed enjoyment, to property and business interests. There is little authority for such an extension of the doctrine, but this may be explained as the result of inherent judicial hesitation to establish new precedents. Many judges have shown an inclination to protect privacy in the use of property by granting relief from prying eyes through strained theories of trespass.⁸⁹ More recently, the holding in at least one case supports extension of the doctrine;⁹⁰ and it has been advocated in several cogently reasoned dissenting opinions.⁹¹ Perhaps the most important of these was written in a recent case in the High Court of Australia,⁹² on facts quite similar to those in the instant situation. Defendants in that case broadcast horse races from a tower outside plaintiff's track. Two strong dissenting opinions argued, on the basis of privacy, for the requested injunction, invoking principles strikingly like those of unfair competition.⁹³ It was asserted that though the common law gives no absolute right of privacy neither does it give an unlimited license to spy. The fact that a man has a legal privilege to look over his neighbor's fence does not necessarily imply a further right to broadcast what he sees, to his neighbor's damage. It is necessary to balance the right

Robertson v. Rochester Folding Box Co., 171 N. Y. 538, 563, 64 N. E. 442, 450 (1902) (Gray, dissenting).

86. See p. 293, *supra*.

87. See Warren and Brandeis, *supra* note 83, at 214, 218; Comment (1938) 33 ILL. L. REV. 87, 97, n. 67. Commercial use, *e.g.*, of photographs, does not fall within these exceptions. New York has adopted a special statute regulating such use. N. Y. CIV. RIGHTS LAW §§ 50, 51.

88. See note 87, *supra*.

89. Hickman v. Maisey [1900] 1 Q. B. 752 (prolonged use of public highway to observe race course trials on plaintiff's adjoining land ruled an unnatural use and so a trespass); The Queen v. Thomas Pratt, 4 El. & Bl. 860 (Q. B. 1855) (using part of highway solely to interfere with rights of owner on another part of the land); Winfield, *Privacy* (1931) 47 L. Q. REV. 23.

90. Rudolph-Mayer Pictures, Inc. v. Pathe News, Inc., 235 App. Div. 774 (N. Y. 1st Dep't 1932) (memorandum decision) (injunction preventing photographing boxing exhibition from overlooking building sustained).

91. Detroit Baseball Club v. Deppert, 61 Mich. 63, 68, 27 N. W. 856, 858 (1886) (use of barn roof adjoining ball park as vantage point for a number of people to view the games at reduced cost); Victoria Park Racing and Recreation Grounds Co., Ltd. v. Taylor, 43 "The Argus" L. Rep. 597, 602, 607 (High Ct. of Australia, 1937); *cf.* Waring v. W. D. A. S. Broadcasting Station, Inc., 327 Pa. 433, 456, 194 Atl. 631, 642 (1937).

92. Victoria Park Racing and Recreation Grounds Co., Ltd. v. Taylor, 43 "The Argus" L. Rep. 597 (High Ct. of Australia, 1937).

93. Evatt, J., specifically cited *International News Service v. Associated Press* and applied its principle to the instant invasion of privacy. *Id.* at 610.

to use one's own property as seems to him best against the duty to avoid unnecessary interference with a neighbor's similar right to put his land to profitable use.

In a jurisdiction applying rules of unfair competition this line of reasoning must carry even more weight. Under liberal doctrines unfair competition cases very often involve the adjustment of conflicting rights, each legitimate if considered alone.⁹⁴ Thus in the *Pittsburgh Pirates* case, the objection was made that the news value of plaintiff's games takes them out of the protection of the privacy right, by analogy with the principles stated above under personal privacy.⁹⁵ Ready answer is afforded by the fact that in this case the news is the very source of profit, and its exclusive control as against competitors within the park has already been sanctioned as not contravening public interest.⁹⁶ Application of the doctrine of privacy to property would extend this protection to the case of infringement from without the park. The troublesome exception to the *News* case is irrelevant in a consideration of such an extension. That exception referred to an independent investigation of generally available facts.⁹⁷ The instant case, on the other hand, is concerned with a private exhibition, restricted by every available means, of an event itself created by plaintiff's effort and expense. Thus what was in the *News* case a mere raw material⁹⁸ has here become the finished product, the direct source of profit. With this in mind, it becomes clear that defendants are not really using their own efforts to any great extent, but are taking as genuine a "free ride" on plaintiffs' labor as did the defendant in the earlier case. Their "independent effort" consists in taking ingenious advantage of the fact that plaintiffs have not the physical means fully to carry out their intent to screen the field from prying eyes.⁹⁹ Clever piracy of this sort should not be allowed for the lack of a direct precedent. Unfair competition necessarily covers many types of legal wrong,¹⁰⁰ and it is clearly both fair and

94. *E.g.*, in *Meyer v. Herwitz*, 5 F. (2d) 370, 371 (E. D. Pa. 1925), the court stated that "the defendant may not, by associating therewith a right which is not denied him, that of imitating the plaintiff's uncopyrighted cards, appropriate to himself the plaintiff's system and organization for the purpose of underselling him and appropriating to himself profits to which the plaintiff, through his efforts, expenditures and industry, is entitled."

95. See note 87, *supra*.

96. See *Twentieth Century Sporting Club, Inc. v. Trans-Radio Press Service, Inc.*, 165 Misc. 71, 73, 300 N. Y. Supp. 159, 161 (Sup. Ct. 1937).

97. See p. 296, *supra*.

98. See *Associated Press v. International News Service*, 245 Fed. 244, 248 (C. C. A. 2d, 1917) (distinction of facts and gathered news).

99. See *Brief for Petitioners*, p. 36, *Pittsburgh Athletic Club v. K. Q. V. Broadcasting Co.*, 24 F. Supp. 490 (W. D. Pa. 1938) (if plaintiffs raised their fence, defendants would resort to a captive balloon!); *cf.* *Victoria Park Racing and Recreation Co., Ltd. v. Taylor*, 43 "The Argus" L. Rep. 597, 611 (High Ct. of Australia, 1937).

100. See *Comment* (1919) 13 ILL. L. REV. 708, 717: ". . . it includes the entire field of infringement in patent law, trademarks, and copyright; the protection of good will, trade names, and trade secrets; and all undue interferences with the normal current of a business enterprise . . ."

sound to extend to this invasion of privacy the principles of the *News* case, which protect exclusive rights for the period necessary to guarantee a fair return on labor and money expended.¹⁰¹

The modern law of unfair competition must rest, then, not on any fixed traditional concepts of certain absolute individual rights, but on a careful balancing of conflicting rights, according to the dictates of enlightened public trade policy. Initiative should be encouraged by preserving to the owner of a lawful business the just reward of his efforts and expense so long as the source of that reward has not become public property either by virtue of the owner's consent, or because of a public need to avoid endangering freedom of competition and the general currency of dynamic ideas. It has been suggested that the application of such a principle endangers the logical structure of our legal system since it extends to fields not covered by patent and copyright statutes protection even greater than those legislative safeguards afford, and provides to matters within the scope of those laws copyright and patent protection extending beyond the statutory period.¹⁰² This viewpoint unnecessarily exaggerates the danger. The principle underlying the doctrines of unfair competition is fundamentally in harmony with patent and copyright statutes in that both aim to preserve exclusive rights only so long as is necessary to ensure a fair return on the effort expended. The decisions go beyond the existing statutes not so much in principle as in scope. They contain a fuller recognition of the growing need to reach a reasonable balance between uncurbed competition and stifling monopoly. Of course it is true that the issues raised in the solution of this problem are often delicate, and involve complex trade situations which could be more coherently and inclusively treated by legislation.¹⁰³ In the absence of such legislation, however, equity should not hesitate to act. So long as technical maxims are not allowed to cloud clear analysis of the true issues, so long as the means of misappropriation do not prevent recognition of the nature of the right invaded, the doctrine of unfair competition will remain a sound and flexible weapon in the eternal struggle between piracy and the law.

101. See note 43, *supra*.

102. See Comment (1919) 13 ILL. L. REV. 708, 719.

103. *E.g.*, the radio-press controversy. See Shapiro, *The Press, the Radio and the Law* (1935) 6 ATR L. REV. 128.